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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/089,831	04/04/2002	Nathan W Levin	BET-105	5604
23520	7590	10/10/2006	EXAMINER	
MAURICE M KLEE 1951 BURR STREET FAIRFIELD, CT 06824			HAYES, MICHAEL J	
			ART UNIT	PAPER NUMBER
			3734	

DATE MAILED: 10/10/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

10/089.831

Applicant(s)

LEVIN ET AL.

Examiner

Michael J. Hayes

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 19 July 2006.
- 2a) ☒ This action is FINAL. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-40 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☒ Claim(s) 1-33 and 40 is/are allowed.
- 6) ☒ Claim(s) 34-39 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 04 April 2002 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

## Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

## Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                       | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

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## **DETAILED ACTION**

### ***Claim Rejections - 35 USC § 101***

35 U.S.C. 101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

Claims 34-39 are rejected under 35 U.S.C. 101 because the claimed invention is directed to non-statutory subject matter. The claims do not recite an invention that produces a useful, concrete, and tangible result. Claims 34, 35, 36, 37, 38, and 39 merely recite an equation to calculate a volume or a constant. See step j of claim 1, step iii of claim 2, and step v of claim 4. The claims lack a recitation of a practical application for the equations. See MPEP 2106.

### **Claim Objections**

Claims 34-39 are objected to as improper dependent claims because they do not incorporate all the limitations of the parent claim. Applicant should rewrite the claims to specifically recite the intended formula.

### ***Allowable Subject Matter***

Claims 1-11, 21-33 and 40 are allowed.

### ***Reasons For Allowance***

Claims 1-11, 21-33 and 40 are allowed because the recited combination of steps or elements of a method and apparatus for determining the volume of a patient's peritoneal cavity using bioimpedance with measuring electrodes in place on a patient and a method and apparatus

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for controlling continuous dialysis fluid flow through a patient's peritoneal cavity using volume determined by bioimpedance measurements directed at the peritoneal cavity is not found nor fairly taught in the prior art of record, as argued by applicant and agreed to by examiner. In claim 28 controlling the means for continuously flowing fluid based on volume determined by bioimpedance measurement directed at the peritoneal cavity where the bioimpedance measurement directed at the peritoneal cavity is accomplished by the second means for determining volume is not found in the prior art of record.

Re claims 21 and 28 the means for determining the volume of fluid in the peritoneal cavity is construed to include the program that calculates volume of fluid in the peritoneal cavity.

### *Response to Arguments*

Applicant has amended claims to recite what the recited equation does, namely calculate a volume. This does not make the claim statutory because the claim still lacks a practical application. The recitation of a description of the equation does not recite a practical application that goes to Applicant's invention. Application needs to recite the practical application that the article of manufacture also includes code means embodied therein for controlling fluid flow in dialysis treatment by using the calculated volume.

### *Conclusion*

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

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A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Michael Hayes at (571) 272-4959. The examiner can usually be reached Monday -Thursday, 7:00-4:30, and on alternate Fridays. The fax number for submitting official papers is (571) 273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

mjh  
2 October 2006



MICHAEL J. HAYES  
SUPERVISORY PATENT EXAMINER